

**Appeal No. 02-2216-CR**

**Cir. Ct. No. 01-CF-338**

**WISCONSIN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**FILED**

**V.**

**JUL 16, 2003**

**DONAVAN W. MALONE,**

Cornelia G. Clark  
Clerk of Supreme Court

**DEFENDANT-APPELLANT.**

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Nettesheim, P.J., Anderson and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

**ISSUE**

During a routine traffic stop may the police request the passengers, as well as the driver, to exit the vehicle and individually ask them questions reasonably related to the nature of the stop?

**FACTS**

The facts are undisputed. State Patrol Trooper Andrew Hyer stopped a vehicle going southbound on I-43 after he clocked it traveling seventy-seven miles per hour. Hyer identified the driver as Josh Moede and asked him

how fast he was traveling; Moede replied he thought he was driving seventy-eight miles per hour. In response to another question from Hyer, Moede said that he had not been wearing his seat belt. Hyer then asked the two passengers in the car for their identification because he observed that they had not been wearing their seat belts. Hyer returned to his cruiser and conducted a record check on all three individuals and found that all had valid operator's licenses.

As Hyer returned to the vehicle, he decided he "just wanted to talk briefly with each of the individuals" because when he first approached the vehicle, he noticed "an unusual number of air fresheners hanging from the rearview mirror." The trial court summarized the events that followed:

Hyer asked the driver, Moede, to step out of the car. The officer asked Moede where they were going and Moede replied that they were going to a family member's house in the Milwaukee area. During their brief conversation, Moede was fidgety and continually put his hands in his pockets even though Hyer asked him not to, so the officer asked if he could pat him down. Moede consented and Hyer patted him down and found nothing. Hyer spoke to Moede for about 30 to 45 seconds.

Hyer next asked [Cory] Marohl [the front seat passenger] to get out of the car. Hyer asked Marohl where they were going and Marohl stated that they were going to a party in Milwaukee. Marohl went on to volunteer that he was on probation for drug-related offenses. Hyer asked Marohl if it was acceptable to his probation agent that he was going to a party in Milwaukee and Marohl replied that he was not going but Moede and [Donavan] Malone [the rear seat passenger] were going to a "rave party." Hyer testified that in his experience "rave parties" are usually associated with drugs. Marohl was also fidgety and put his hands in his pockets even though Hyer asked him to stop. Marohl consented to be patted down and Hyer patted him down and found nothing. Marohl seemed excited and nervous and did not make a lot of eye contact. He also talked very fast. Hyer's conversation with Marohl also took about 30 to 45 seconds.

Hyer next had a conversation with Malone. When asked where they were going, Malone said that they were going to see one of the other guy's family members, but he did not know the family they were going to see. Malone said he was just along for the ride. When asked if he had ever gotten any tickets before, Malone stated that he had received some traffic tickets and some drug-related tickets. Hyer asked him if he was still using drugs and Malone stated he was still using marijuana. Hyer asked Malone if he had any marijuana on him and Malone denied that he had any. Malone was taking his hands in and out of his pockets. Hyer asked him to stop taking his hands in and out of his pockets, but Malone continued to do so. Malone consented to be patted down. Malone faced the vehicle while Hyer patted him down. Hyer felt "two distinct hard objects that felt like boxes" and "a third object that was about the size of a half dollar and was squishy to the touch" in Malone's right front pants pocket. Hyer asked Malone what was in the pocket and Malone answered that he just had cigarettes. Based on Hyer's training and experience, he thought that the packet felt "like a packet that's ... commonly rolled in a manner to hold marijuana." Hyer reached into Malone's pocket and pulled out the packet. Hyer observed a "very small amount of green leafy material" with a "very strong odor of marijuana." Malone said he did not know what the substance was and Hyer placed handcuffs on him and placed him under arrest for possession of marijuana.

With the assistance of back-up officers, Hyer searched the entire vehicle and found a marijuana pipe, \$4400 in cash, zigzag rolling papers and more marijuana. Moede and Marohl were then placed under arrest by the officers.

Malone moved to suppress the search and the results. He argued that *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), was directly on point and required the trial court to suppress the search. He asserted that Hyer lacked sufficient reasonable suspicion to warrant extending the routine traffic stop and initiating a narcotics investigation. The trial court denied the motions, finding that the facts of this case take it beyond *Betow*. Malone subsequently entered a plea to one count of conspiracy to deliver marijuana in violation of WIS. STAT.

§ 961.41(1)(x) (2001-02), and brought this appeal to challenge the denial of his suppression motion.

In *Betow*, we held:

There is no question that a police officer may stop a vehicle when he or she reasonably believes the driver is violating a traffic law; and, once stopped, the driver may be asked questions reasonably related to the nature of the stop—including his or her destination and purpose. Such a stop and detention is constitutionally permissible if the officer has an “articulable suspicion that the person has committed or is about to commit [an offense].”

*Betow*, 226 Wis. 2d at 93-94 (citations omitted).

## DISCUSSION

The facts of this case require consideration of whether *Betow*’s approval of reasonable questioning of a driver should be extended to permit reasonable questioning of passengers. In *Betow*, we cited to *United States v. Johnson*, 58 F.3d 356 (8th Cir. 1995), to support our conclusion that during a routine traffic stop a police officer may ask the driver questions reasonably related to the purpose of the stop. *Betow*, 226 Wis. 2d at 93. In that case, Ronald T. Johnson was stopped in Missouri for tailgating while speeding and the police officer took Johnson to his patrol car to complete a computer check of Johnson’s driver’s license and vehicle registration. *Johnson*, 58 F.3d at 356-57. While waiting for the results, the officer asked Johnson about his trip and he replied that he, his wife and child were on the last leg of a round-trip drive between Indiana and Las Vegas. *Id.* at 357.

The computer check revealed that Johnson could drive in the presence of another licensed driver. *Id.* The officer returned to Johnson’s vehicle

and after confirming that Johnson's wife had a valid operator's license, he asked her about their trip. *Id.* Initially, she replied that they were returning from California, but then said they were returning from Laughlin, Nevada, where they had been visiting relatives. *Id.* Mrs. Johnson gave the officer consent to search the car. *Id.* Because of suspicious alterations to the fuel tank, a thorough inspection of the vehicle was done at a police station and over six kilograms of cocaine and some marijuana were found. *Id.*

In affirming the trial court's denial of Johnson's motion to suppress, the Eighth Circuit addressed Johnson's contention that the stop became an unconstitutional detention when the officer began to question his wife after checking her driver's license. The court first held, "During a traffic stop, 'reasonable investigation includes asking for the driver's license and registration, requesting that the driver sit in the patrol car, and asking the driver about his destination and purpose.'" *Id.* (citation omitted). Obviously, this holding is what we relied upon in *Betow*.

The Eighth Circuit went further:

Likewise, an officer may engage in similar routine questioning of the vehicle's passengers to verify information provided by the driver. Moreover, "if the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions."

*Johnson*, 58 F.3d at 357 (citation omitted). It explained that the inconsistent answers the officer got from Johnson and his wife justified expanding the scope of the traffic stop: "If reasonably related questions raise inconsistent answers ... a trooper's suspicions may be raised so as to enable him to expand the scope of the

stop and ask additional, more intrusive questions.” *Id.* at 358 (quoted source omitted).

In *Betow*, the driver was the sole person in the car and we did not have reason to address the Eighth Circuit’s conclusion that it is constitutionally permissible for a police officer to ask questions of the passengers. However, the facts of this case directly present that issue. While the Eighth Circuit has addressed variations of this question in a number of cases, it appears to be a question of first impression in Wisconsin.<sup>1</sup>

## CONCLUSION

The Wisconsin Supreme Court is the appropriate forum to address the constitutional issues and public policy concerns surrounding this issue. For example, in this case the passengers, Malone and Marohl, were not wearing seat belts when the car was stopped by Hyer; if the trooper can question them, are the reasonable questions he may ask limited to their seat belt violation or may they be asked questions related to the original reason for the traffic stop? If the passengers had not been guilty of any traffic regulation violation, may they be questioned to verify the information provided by the driver? If the passengers may be questioned, can the trooper require them to exit the vehicle and question them separately to test for consistency of information? If the trooper perceives the information he receives to be inconsistent, does that constitute an articulable suspicion justifying an expansion of the scope of the stop?

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<sup>1</sup> *United States v. Gregory*, 302 F.3d 805 (8th Cir. 2002), *cert. denied*, *Gregory v. United States*, 123 S. Ct. 1815 (2003); *United States v. Linkous*, 285 F.3d 716 (8th Cir. 2002); *United States v. Edmisten*, 208 F.3d 693 (8th Cir. 2000); *United States v. Perez*, 200 F.3d 576 (8th Cir. 2000); *United States v. Lyton*, 161 F.3d 1168 (8th Cir. 1998).

We respectfully certify this case because the potential impact of the answers to these questions upon the citizens of Wisconsin requires the studied resolution that can only be provided by the Wisconsin Supreme Court.

